UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

LAIDLAW TRANSIT, INC. d/b/a
LAIDLAW EDUCATION SERVICES[1]

Employer

and Case 36-RD-1580

CARRIE POTEET, an Individual[2]

Petitioner

and

TEAMSTERS LOCAL NO. 206,
affiliated with INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[3] in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

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[1] The name of the Employer appears as corrected at hearing.
[2] The name of Petitioner appears as corrected at hearing.
[3] The Employer and Union filed briefs, which have been considered.

All drivers and mechanics employed by the Employer at its Eugene, Oregon, facility; but excluding all office clerical employees, guards and supervisors as defined by the Act, and all other employees.

The Employer is engaged in the operation of transportation services at various locations throughout the United States, including the facility involved herein, located in Eugene, Oregon. The parties stipulated that the appropriate unit includes all drivers and mechanics employed by the Employer at the Eugene facility. The sole issue in the hearing is the Union's contention that there is a contract bar. The Petition herein was filed on August 28, 2000.

The Union was certified as the bargaining representative on March 16, 1998 in a unit of all drivers and mechanics employed at the Employer's Eugene, Oregon, facility. The parties entered into negotiations, which concluded on August 20, 1999.[4] On that date, the Employer gave the Union a last and final offer, which the Union accepted.

At that time, the parties signed the last and final offer document. The signature page states, inter alia:

> EFFECTIVE DATE -- All terms and conditions of Agreement shall be in force and effect upon ratification through 12:00 midnight, August 31, 2001.

Also on August 20, Ron Teninty, the Union's representative, sent a memo to Perri Newell, the Employer's regional human resources manager in which he informed Newell that:

> The Union has agreed to allow the Employer to implement the final offer received today at 2:23 p.m. and tentatively approved by the Union. The Union will vote the bargaining unit shortly after my return to work on September 7, 1999.

On September 10, Newell notified Teninty that the Employer had implemented the last and final offer, as agreed, including the union security clause. The parties had agreed that the union security clause would be effective as of September 1.[5] Newell also asked Teninty to contact branch manager Iretta Fowler to schedule a meeting with the employees in which the Union would explain the Union security clause to the employees.

On October 1, Newell sent the Union a copy of the last and final offer with the agreed upon union security clause and new charter rates included, along with a disc containing the same documents, and requested that the Union format the documents to its satisfaction[6] and return a hard copy to the Employer for "approval and signature." Newell's message to Teninty closed with the message, "Thanks for your help and good luck on the vote." The parties signed the last and final offer a second time, Newell on October 1, 1999, and Teninty on October 4, this time with the added union security clause included.

At hearing, Newell testified that sometime during the month of October 1999 Teninty called her and told her that the membership had not ratified the agreement. He asked her, "What are we going to do?" and she replied, "I don't know. It's up to you."

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[4] All dates hereinafter are 1999 unless otherwise specified.

[5] The union security clause was not part of the Employer's last and final offer presented on August 20.

[6] When they reached agreement on August 20, the parties had an understanding that a formal contract document would be prepared and signed after the ratification had taken place.

She also testified that branch manager Iretta Fowler and district manager Van Criddle had at some point told her that employees had made some complaints to them about the voting process. Sometime later, after her telephone conversation with Teninty, she met with seven to nine employees over lunch. Regarding what the employees said to her in that meeting, she testified:

> They told me that they were upset about the voting process. That they had been told that they had to go to the union and just write, you know, whatever they were writing on a piece of paper, and they were -- some of them were upset because when they signed a piece of paper – I don't know, they were upset about it because they said that they were being – like signing up for the union, and they didn't realize they were, and they were voting, and they were -- it was just confusing to them.

During that lunch meeting, the employees handed her a document entitled "contract," which had the signature page from the last and final offer attached. In her testimony she referred to the document as "totally fraudulent" and "bogus," saying that, "It looked like it was a ploy to show the employees that the thing had been accepted." She did not read the document and could not testify as to whether the provisions therein were the same as those in the accepted last and final offer. Thus, Newell was under the impression there had been a ratification meeting resulting in a rejection of the contract.

Teninty testified that when the Employer had completed its hiring process in September 1999, he found that most of the individuals who had been employed the year before had not returned,[7] including all who had been union members and had been on withdrawal during the summer. He called Newell and told her that the Union had a problem with regard to ratification, as only members could vote, and they had no members. To this she had responded, "Well, that's your problem. You guys got to deal with it."

He then told her that it was an unusual situation, that he had discussed it with the Union's attorneys at the International in Washington, D.C., and that "we would accept the contract on behalf of the Union." He asked her to send him the last and final offer on a disk, and the Union would formalize it with a cover page, an index, and a signature page which would include a space for the signature of the president of the Local. There was no elaboration on the "would accept" statement by Teninty in his testimony. Newell says no discussion along those lines ever took place.

Teninty testified that no ratification vote was ever held because there were no Union members among the Employer's employees. He said he did not hold any meetings with the employees at the Union hall, although he did talk to employees in the lunchroom at the Employer's facility a few times. He said no ratification balloting was ever conducted, although prior to the last and final offer at times employees had been asked to vote on whether to accept a particular proposal. Such voting all occurred prior to final agreement in August 1999.

[7] While not in the record, it is assumed here that the Employer provides school bus transportation, which necessitates the summer layoff and September rehire of employees. I take administrative notice that the Employer provides school bus transportation at many locations in Oregon and Washington.

On February 11, 2000, Teninty sent Newell four copies of the collective bargaining agreement for her signature. Newell responded by letter on March 1. She asked Teninty, "Has the membership ratified this contract or are you accepting the contract on behalf of the membership?" In addition, she was dissatisfied with the signature language, and wanted there to be four separate signature spaces under the heading, "For the Company." She asked that the Union revise the signature page, sign the documents, and then send them back to the Employer.

Thomas Leedham,[8] president of Local 206, told Teninty that the Local's policy was to have the employer sign first. Teninty testified that, "So at that point I decided, look, I'm not going to get into a pissing contest over who signs it first and who signs it second; we have a document, it's already signed off on, I'm just going to leave it at that." He subsequently distributed copies of the contract with the signature page from the last and final offer attached.

On September 8, 2000, Newell sent a letter to Teninty advising him that the Employer wanted to offer a wage increase. Teninty responded in a letter discussing the proposed increase. Neither letter mentioned the collective bargaining agreement with respect to ratification or signature. Thus, Newell never questioned, in this exchange, whether there was a contract, or "whatever happened" to the ratification, or when was the Union going to ratify or accept the contract formally? [This contact was after the August 28, 2000 petition filing.]

The Union's Constitution provides that agreements shall be accepted by a "majority vote of those members involved in negotiations and voting." It also states that the Local Union Executive Board may order a secret ballot strike vote to be taken, and that when an employer has made a final offer of settlement, the offer must be submitted to the involved membership for a secret ballot vote. Further, it states that "The failure of such membership to reject the final offer *and* (emphasis added) to authorize a strike as herein provided shall require the Local Union Executive Board to accept such final offer or such additional provisions as can be negotiated by it." Presumably, the International's legal office has authority to interpret the provisions of the Constitution and provide guidance to the Local.

The Board has long held that "Where ratification is a condition precedent to contractual validity by express contract provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition…" *Appalachian Shale Products*, 121 NLRB 1160 (1958).

Recently, the Board was stymied in a 2-2 tie in a Request for Review concerning how specifically defined the mechanics of a ratification must be, and whether the Board could or should interpret any ambiguity. *United Health Care Services, Inc*., 326 NLRB 1379 (1998).

If, as here, there is a ratification clause, and the Union "accepts" the contract, the Board law is somewhat contradictory. There are many cases stating that an employer may not question the Union's ratification procedures. See, e.g., *Martin J. Barry Co*., 241 NLRB 1011, 1013 (1979). Nevertheless in *Beatrice/Hunt-Wesson Co*., 302 NLRB 224 (1991) the Board held that the Union did not ratify the agreement consistent with the terms of the agreement where ratification ultimately was decided, after several failed attempts, by one person in a 100-person unit.

In *Childers Products Co*., 276 NLRB 709 (1985), the parties reached agreement on all contract terms, including the provision "This agreement subject to ratification." Thereafter, the union scheduled a meeting with employees to present the contract and take a vote, but no

[8] Leedham is identified in the record only by his last name. I take administrative notice that his full name is Thomas W. Leedham.

employees showed up. The union's normal proceeding was that in the event that a proposed contract was not accepted by a majority of the employees, nor a strike favored by two-thirds of the employees, the contract would be presented to the executive board, which would then vote whether to accept or reject it. In *Childers*, the union's executive board met, the contract was presented to them, and a motion to put the contract into effect was seconded and passed.

Childers refused to accept this as a ratification. The ALJ found that the ratification procedure used complied with the terms of the agreement and with the union's internal procedures. More significantly, the ALJ also found that in any event the employer "had no standing to question the Union's procedure and that the method of contract ratification was within the Union's exclusive domain and control." Id at 711. The Board adopted the ALJ's decision without modification.

Here, there never was a "ratification" as the term is generally used in labor relations, i.e., a vote by [the unit] [membership] to accept the Employer's offer. The only arguable basis available for the Union to claim a contract bar is that *acceptance* of the contract was communicated to the Employer by Teninty's alleged statement that the Union "would accept" the contract.

There is Board case law that would support the idea that a Union can decide whether and how to define "ratification," especially where, as here, unique circumstances make a vote problematic. There is likewise the concept that ratification is in most circumstances a condition sought by the union, for the benefit of the union, a contingent acceptance pending the vote of the membership. Similarly an employer might agree to a contract, subject to approval of its Board of Directors. As such, the party that sought and obtained the condition ought to be free to waive the condition it sought for its own benefit, without the other party intermeddling and insisting that there must be a formal ratification by the union's membership or Executive Board, or the employer's Directors.

Thus, if the evidence here clearly showed that Teninty, on behalf of the Union, had unambiguously, demonstrably communicated acceptance of the agreement -- for instance, by announcing by letter that the Union was withdrawing its ratification condition -- I would have little difficulty in finding a contract bar as of that point.

However, in matters of contract bar, the Board insists on clarity, and avoids the possibility of employer/union connivance or credibility disputes, by requiring, more or less indisputable specifics. Lacking the specified completeness, clarity, writing and signature, a purported agreement will not constitute a bar.

Here, the party claiming -- the Union -- has left a trail of readily avoidable ambiguity. It did not communicate "acceptance" in writing, but rather did so orally, if at all. The testimony regarding that acceptance is in total conflict with the Employer's testimony. Even Teninty's testimonial version is inconclusive. "We would accept." What does that mean? Did he use these exact words? Was he paraphrasing in his testimony? Was there an unmentioned condition attached, given the use of "would"? Was there no response from the Employer? No follow-up from Teninty?

The Union here has failed to provide any evidence, other than Teninty's vague testimony that "we" "would" accept the contract. There was no written document that the Executive Board

had ratified or accepted, as was done in *Childers,* or that the Union had "waived" the ratification condition it had obtained. There was no letter confirming the alleged Teninty call.

The same principles that mandate a signed, substantial writing to support a claim of pre-petition contract formation, would warrant at least a requirement of clear, unambiguous proof -- if not a writing -- to support a claim of ratification, acceptance or waiver of the ratification claim. The party claiming a bar has the burden of establishing the bar. *The German School Society*, 260 NLRB 1250, 1256 (1985). There is no way to make a credibility resolution in a representation case. Given the interplay of all of these considerations, I conclude that the Union has not made its case that the contract was accepted or the ratification condition withdrawn.[9]

I conclude that there is no contract bar proved with sufficient clarity. Accordingly, I shall direct an election.

There are approximately 25 employees in the unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Teamsters Local No. 206, affiliated with International Brotherhood of Teamsters, AFL-CIO.

NOTICE POSTING OBLIGATIONS

According to Board Rules and Regulations, Section 103.20, Notices of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation should proper objections to the election be filed. Section 103.20(c) of the Board's Rules and Regulations requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

LIST OF VOTERS

[9] If, indeed, such a theory is otherwise viable.

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Officer-in-Charge for Subregion 36, 601 SW Second Avenue, Suite 1910, Portland, Oregon within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the **new** Subregional Office, 601 SW Second Avenue, Suite 1910, Portland, Oregon 97204, on or before October 18, 2000. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (503) 326-5387. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by October 25, 2000.

DATED at Seattle, Washington, this 11th day of October 2000.

/s/ PAUL EGGERT

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347-4020-3350-5000